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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 238

DOROTHEA QUIRK, ADMINISTRATRIX DE BONIS NON OF THE ESTATE OF EDWARD E. QUIRK, DECEASED,

Petitioner,

vs.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, A CORPORATION, SOMETIMES KNOWN AND DESCRIBED AS NICKEL PLATE ROAD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT WITH SUPPORTING BRIEF.

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No. .....

DOROTHEA QUIRK, ADMINISTRATRIX DE BONIS NON OF THE ESTATE OF EDWARD E. QUIRK, DECEASED,
Petitioner and Appellant Below,

vs.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, A CORPORATION, SOMETIMES KNOWN AND DESCRIBED AS NICKEL PLATE ROAD,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT WITH SUPPORTING BRIEF.

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is an action brought under the Federal Employers' Liability Act in the United States District Court for the Northern District of Indiana, for the benefit of a deceased employee's widow and children, charging respondent rail-

road with negligently causing the death of petitioner's decedent while he was on his way home from work on a railroad motor car. (R. 2.) The case was tried before a jury according to petitioner's request. (R. 7.) At the conclusion of the evidence, respondent moved to dismiss for want of jurisdiction and moved for a directed verdict on the sole ground that decedent was not shown to have been engaged in interstate commerce at the time of his fatal injury. (R. 11, 12.) These motions the District Court denied reserving the right to reconsider (R. 12), and submitted the case to the jury on all issues (R. 88), which returned a verdict for petitioner in the amount of $20,000.00. (R. 93.) Respondent then moved the court to set aside the verdict and enter dismissal, thereby renewing its contention made at the close of the evidence. (R. 98.) The District Court granted this motion and the action was dismissed on the merits. (R. 104.) The Court of Appeals for the Seventh Circuit affirmed, 189 F. (2d) 97, holding that the District Court properly decided as a matter of law upon undisputed facts that the employer-employee relation did not exist at the time of the fatal injury. (R. 128.)

Two issues are presented to this Court by this petition:

First: Whether the District Court properly took from the jury the issue of whether the employment relation existed at the time of his death, and

Second: Whether the District Court's holding upon that issue was correct upon the law and the evidence most favorable to petitioner.

The respondent is a common carrier by railroad engaged in interstate commerce. (R. 14.) Decedent had been its employee continuously since 1924. (R. 16.) For fourteen years prior to November 5, 1948, the date of his death, he was general foreman in charge of track maintenance. (R. 15, 19.) He was a monthly-pay employee. (R. 27, 28.) He was subject to call twenty-four hours a day, seven days

a week. (R. 19, 53.) Decendent's home was in Sharpsville, Indiana, which is six miles north of Tipton on respondent's Indianapolis Division. (R. 15, 35.) His headquarters was at Tipton. (R. 20.) There was no public transportation between Sharpsville and Tipton. (R. 19.) Decedent owned no automobile. (R. 19.) For fourteen years he traveled between headquarters and home on respondent's rails by means of a motorized hand car. (R. 19, 20.) Respondent assigned this car to him to use wherever he had to go to take care of his work. (R. 27.) He used it everywhere. (R. 27.) He used it to go back and forth between headquarters and his home and the entire system knew it. (R. 27.) On that day decedent was in charge of respondent's work train and section crews at Vernon, Indiana, near Muncie, Indiana, on respondent's Middle Division. (R. 36.) They were building a passing track extension. (R. 36.) Muncie is about 36 miles from Tipton by rail. (R. 35.) When necessary, decedent could stay at Muncie at respondent's expense. (R. 38.) The work at Vernon had progressed three to five days. (R. 36.) Decedent had come home to Sharpsville on the nights of November 3rd and 4th. (R. 18.) On the afternoon of November 5th, it was raining hard and the men were released to go home. (R. 22, 23.) The work train had gone and nobody was working. (R. 60, 62, 63.) At ten or fifteen minutes after three, decedent returned to headquarters at Tipton in the private automobile of another employee. (R. 60, 62.) He came right straight back to Tipton. (R. 63.) It was common practice for monthly-pay employees to get to and from their jobs by whatever transportation could be arranged. (R. 72.) He had neither express permission nor express orders not to return home. (R. 39, 43.) While proceeding from Tipton to Sharpsville by respondent's motor car and on its rails, he was instantly killed in a head on collision with another motor car. (R. 14, 23, 40.)

The action of the District Court dismissing petitioner's action on the merits is a final decision. Its affirmance by the Court of Appeals for the Seventh Circuit constitutes a denial to petitioner of a remedy under the Federal Employers' Liability Act.

THIS COURT'S JURISDICTION.

This Court's jurisdiction is invoked under Section 1254 (1), Title 28 U. S. C., and Supreme Court Rule 38 (5) (b) as amended.

The Federal Employers' Liability Act, 45 U. S. C. A. Sec. 51-59, grants a remedy against any common carrier by railroad engaged in interstate commerce negligently causing in whole or part injury or death to any employee while employed in interstate commerce. An employee, any part of whose duties is in furtherance of interstate or foreign commerce, or, in any way directly or closely and substantially affects interstate commerce, is considered as being employed in interstate commerce and entitled to the benefits of the Act.

This Court has held an employee, who is injured while leaving his employer's premises at the close of his day's work, within the protection of the Federal Employers' Liability Act. *Erie Railroad Co.* v. *Winfield,* 244 U. S. 170, 37 S. Ct. 556, 61 L. Ed. 1057. This Court has further held that an employee, while being transported to or from work by the employer as an incident of the employment, is within the course of employment. *Cardillo* v. *Liberty Mutual Insurance Company,* 330 U. S. 469, 67 S. Ct. 801, 91 L. Ed. 1028; *Voehl* v. *Indemnity Insurance Company of North America,* 288 U. S. 162, 53 S. Ct. 380, 77 L. Ed. 676; *Cudahy Packing Company* v. *Parramore,* 263 U. S. 418, 44 S. Ct. 153, 68 L. Ed. 366. This is held to be true whatever form of transportation is utilized. *Cardillo* v. *Liberty Mutual*

Insurance Co., 330 U. S. 469, 482, 67 S. Ct. 801, 809, 91 L. Ed. 1028. The holding of the United States Court of Appeals for the Seventh Circuit is in conflict with these decisions, or, if it is not, it decided an important question involving application of the Federal Employers' Liability Act which has not but should be settled by this Court.

The United States Court of Appeals for the Fifth Circuit held that an employee, who had resumed his travel toward his next place of work following a deviation from a direct course of travel in order to conduct personal business, was within the course of employment upon the resumption, thereby rejecting the contention that the employee remained outside the course of employment until he reached the place where he was to resume work. *Maryland Casualty Company* v. *Levine*, 5 Cir., 67 F. (2d) 816. And, in *C. F. Lytle Co.* v. *Whipple*, 156 F. (2d) 155, the United States Court of Appeals for the Ninth Circuit similarly held that the question of whether an employee was within the course of his employment while riding from his place of work to his barracks in his employer's truck, although he had gotten intoxicated early in the evening, was a question of fact and that the affirmative finding upon that issue was supported by the evidence. The holding of the Court of Appeals in this case is in conflict with these decisions by courts of equivalent jurisdiction and this Court ought to resolve that conflict.

Furthermore, this Court has defined the province of the jury in cases brought under the Act with meticulous particularity and the holding of the Court of Appeals is in conflict with this Court's decisions in the following cases, to-wit: *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610; *Tennant* v. *Peoria & Pekin Union Railway Company*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520; *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct.

740, 90 L. Ed. 916; *Wilkerson* v. *McCarthy*, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497.

The Court of Appeals decision was entered May 25, 1951, and this petition was filed within three months.

THE QUESTIONS PRESENTED.

Where transportation to and from work is an incident of the employment relation, is the employee otherwise qualified entitled to the benefits of the Federal Employers' Liability Act while traveling home from work?

Where such an employee temporarily deviates or departs from the course of employment prior to or while proceeding home, then proceeds to travel from his work to his home on its right of way by transportation provided by the employer as an incident of his employment, is he entitled to the benefits of the Federal Employers' Liability Act while so traveling?

Is the issue of whether decedent's death occurred within the course of his employment one of fact for the jury or one of law for the court?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

Petitioner was deprived of the remedy provided by the Federal Employers' Liability Act upon the sole ground that her decedent traveled from Vern to Tipton in the private automobile of a fellow employee, when he could have stayed over night in Muncie, Indiana, at the employer's expense. Such holding ignores the evidence that decedent was provided transportation by the railroad as an incident of the employment (R. 19, 20, 27), that he was a monthly-pay employee on call twenty-four hours a day, seven days a week (R. 19, 27, 28, 53), that it was common practice for such employees to get to and from the job by whatever

transportation could be arranged (R. 72), that there was no showing of any necessity that decedent stay at Muncie that night (R. 38), and, further, that the fatal accident occurred not between Vernon and Tipton but between Tipton and Sharpsville (R. 14), while decedent was proceeding home upon respondent's right of way (R. 14), by transportation provided him by the respondent for that purpose. (R. 27.) The decision of the Court of Appeals, therefore:

1. Conflicts with applicable decisions of this Court on

   (a) the scope of employment where transportation is an incident of employment, and

   (b) the province of the jury in Federal Employers' Liability cases, or

2. Decides a substantial Federal question which this Court has not settled, and

3. Conflicts with applicable decisions of other United States Courts of Appeal.

WHEREFORE, petitioner prays this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 189 Federal Reporter (2d) 97 and appears in the record. 87 p. 1-10.

JURISDICTION.

The jurisdiction of the Court is invoked under Section 1254 (1) of Title 28, United States Code. The Court of Appeals has, in this case, entered a decision which conflicts with applicable decisions of this Court and other Courts of Appeal, and/or decides an important question arising under the Federal Employers' Liability Act which has not been settled by this Court. (Rule 38 (5) (b).)

The judgment of the United States Court of Appeals for the Seventh Circuit was entered May 25, 1951.

STATEMENT.

This is an action for damages for the death of petitioner's decedent brought under the Federal Employers' Liability Act. The District Court submitted the issues of negligence, contributory negligence, proximate cause and employment in interstate commerce to the jury (R. 88), which returned a general verdict for petitioner in the amount of $20,000.00. (R. 93.)

Without challenging the sufficiency of the evidence to support the verdict on the issues of negligence, contributory negligence and proximate cause, respondent moved

for dismissal and the District Court set aside the verdict and entered judgment of dismissal on the single ground that the evidence, as a matter of law, showed that at the time of collision and death decedent was not in the course of his employment. (R. 99.)

This action of the District Court was affirmed by the Court of Appeals on the ground that the evidence on the single controverted issue was undisputed and consequently presented a question of law. (R. 120.)

The evidence on the issue of whether the collision and death occurred in the course of employment is thus concisely stated:

The respondent is a common carrier by railroad engaged in interstate commerce. (R. 14.) Prior to the death of petitioner's decedent on November 5, 1948, he had been in respondent's employ twenty-four (24) years. (R. 16.) He was general foreman in charge of track maintenance with headquarters at Tipton, Indiana. (R. 15, 19, 20.) He was a monthly-pay employee. (R. 27, 28.) He was subject to call twenty-four hours a day, seven days a week. (R. 19, 53.) His home was at Sharpsville, Indiana, which is six miles North of Tipton on respondent's Indianapolis Division. (R. 15, 35.) There was no public transportation between Sharpsville and Tipton. (R. 19.) Decedent owned no automobile. (R. 19.) His family consisted of his wife and eleven children. (R. 16.) It was his custom to go, and he did go, home from work at night every chance he got. (R. 22.) Such custom was known to respondent. (R. 22.)

It was common practice for monthly-pay employees to get to and from their jobs by whatever transportation they could arrange. (R. 72.) Respondent provided him with a motorized hand car, which ran on the rails, for use in his work. (R. 27.) With its knowledge, he had used such

car for fourteen (14) years in going everywhere, including traveling between his home at Sharpsville and his headquarters at Tipton. (R. 27.) The entire system knew he used the car to go back and forth between home and work. (R. 27.)

On November 3, 4 and 5, 1948, he and his crew were performing work near Vernon, Indiana, on respondent's Middle Division and twenty-six (26) miles distant from his headquarters at Tipton. (R. 35, 36.) He had neither express permission to return home from Vernon nor express orders not to do so. (R. 39, 43.) He went to his home at Sharpsville, thirty-two (32) miles from Vernon, on the nights of November 3 and 4, 1948. (R. 18.) Because of bad weather on November 5, 1948, he stopped the work at Vernon and released his crew to go home about 3:00 P. M. (R. 22, 23.) After everybody had quit work and gone and the work train had left, he could have stayed at Muncie at respondent's expense if necessary. (R. 38.) Instead he proceeded directly and without delay in the automobile of a fellow employee to his headquarters at Tipton. (R. 60, 62, 63.) The motor hand car ordinarily used by him being in use by another of respondent's employees, he used another for the remainder of the journey to his home at Sharpsville. (R. 48, 49.)

While so traveling from Tipton to Sharpsville, a head on collision occurred with another car and he was instantly killed. (R. 14, 23, 40.)

The effect of this holding was to deprive petitioner of the remedy Congress afforded the families of railroad employees by the Federal Employers' Liability Act upon the ground that the employment relation ceased when decedent traveled from Vernon to Tipton in the private automobile of a fellow employee and did not thereafter resume.

It is petitioner's contention that whether decedent was

within the course of his interstate employment was a fact issue which depended on whether transportation to and from work was provided decedent as an express or implied incident of the employment. This was for the jury under this Court's decisions in *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; *Tiller* v. *Atlantic Coast Line Railroad Company*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610; *Tennant* v. *Peoria Union Railway Company*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520; *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; *Wilkerson* v. *McCarthy*, 336 U. S. 53, 68 S. Ct. 413, 93 L. Ed. 497.

Petitioner further contends that an employee otherwise entitled to the benefits of the Federal Employers' Liability Act, whose transportation to and from work is provided as an incident of his employment, continued to be entitled to such benefits while so traveling under this Court's decisions in *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U. S. 469, 67 S. Ct. 801, 91 L. Ed. 1028; *Voehl* v. *Indemnity Insurance Company of North America*, 288 U. S. 162, 53 S. Ct. 380, 77 L. Ed. 676; *Cudahy Packing Company of Nebraska* v. *Parramore*, 263 U. S. 418, 44 S. Ct. 153, 68 L. Ed. 366.

Furthermore, petitioner contends that, since the fatal accident did not occur during the Vernon to Tipton trip, the aspects of that trip are immaterial on the issue of scope of employment. Even if there had been a temporary departure or deviation prior to the trip home on the employer's premises and by transportation provided by the respondent railroad, such would not affect petitioner's remedy under the Act.

ERRORS ASSIGNED.

First. The United States Court of Appeals for the Seventh Circuit erred in holding that the issue of whether the employment relation existed at the time of his fatal injury within the meaning of the Federal Employers' Liability Act was a question of law for the District Court.

Second. The said Court erred in holding, as a matter of law, that the employment relation had terminated before the fatal accident because decedent traveled from Vernon to Tipton in the private automobile of a fellow employee when he could have stayed at Muncie at the employer's expense.

Third. The said court erred in holding, as a matter of law, that a deviation from the employment relation may not be terminated by traveling from the place of employment to his home on the employer's premises by means of transportation provided by the employer as an incident of the employment.

ARGUMENT.

I.

The Province of the Jury Was Invaded by the Action of the District Court and the Court of Appeals' Affirmance Thereof.

The right to trial by jury is a basic right and essential to the railroad worker's remedy under the Federal Employer's Liability Act.

Bailey v. *Central Vermont Ry.*, 319 U. S. 350, 354; 63 S. Ct. 1062, 1064, 87 L. Ed. 1444.
Amendment 7, United States Constitution.

This Court has frequently granted certiorari to prevent usurpation of that right by State and United States courts.

Tiller v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610.
Tennant v. *Peoria & Pekin Union Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520.
Lavender v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916.
Wilkerson v. *McCarthy*, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497.

A railroad employee is within the course of his employment while walking to or from his place of work on his employer's premises.

Erie Railroad Co. v. *Winfield*, 244 U. S. 170, 37 S. Ct. 556, 61 L. Ed. 1057.
North Carolina R. R. Co. v. *Zachary*, 232 U. S. 248.
Morris v. *Pennsylvania R. Co.*, 187 F. (2d) 837, 841.

Coleman v. *Reading Co.*, 346 Pa. 259, 29 A. (2d) 499, 501.

Rogers v. *Davis*, 228 P. 330, 332.

Louisville v. *Walker*, 162 Ky. 209, 172 S. W. 517.

Similarly, a railroad employee is within the course of his employment while being transported on his employer's premises to or from his place of work by his employer's vehicle with the consent of the employer express or implied.

Atlantic C. L. R. Co. v. *Williams*, 284 F. 262 (Fireman hurt while boarding shuttle train carrying employees to and from work).

Ramsay v. *Baltimore & O. R. Co.*, 301 Ill. 169, 133 N. E. 703 (Oiler killed while going from place of work to his home on employer's hand car).

Southern R. Co. v. *Jaynes*, 86 Ind. App. 451, 456 (Section hand riding home on railroad motor car).

Covington v. *Atlantic C. L. R. Co.*, 155 S. E. 438, 441 (Signalman going home on three-wheeled velocipede).

San Pedro, etc. v. *Davide*, 210 F. 870 (Section hand killed while traveling on hand car between camp where he lived and place where he worked).

Horton v. *Oregon, etc.*, 72 Wash. 503, 130 P. 897 (Pumper killed going home from work on hand car).

In *Atlantic C. L. R. Co.* v. *Williams*, 284 F. 262, the Court in part said:

> "It seems to us that he was for all practical purposes on the premises of the company engaged in going to such work, using a means the right to use which arose solely from his employment and at the time his relation to his employer was that of an employee engaged in interstate commerce." (264)

Similarly, in *Morris* v. *Pennsylvania R. Co.*, 187 F. (2d) 837, the Court in part said:

> "The course of employment within the Federal Employers' Liability Act is not limited to the actual work done but includes passage across the employer's premises to and from the place of work where that is a necessary [or reasonable or proper] incident of the day's work." (841)

And, in *Covington* v. *Atlantic C. L. R. Co.*, 155 S. E. 438, the court in part stated:

> "The plaintiff, at the time the accident occurred, was still on the property of the defendant, though some short distance from the immediate place of his work, on his way home by a method of travel provided for him by his employer; and, as stated in the *Giles* case [276 U. S. 154], the injury he suffered arose 'out of and in the course of the employment as such as though it had happened while the employee was engaged in his work at the place of its performance.'" (441.)

Here the decedent was killed while operating respondent's motor hand car on its right of way on his return home from headquarters.

Whether, at the time of the fact collision, the decedent was in the course of his employment depended upon the elements of the particular contract, including whether transportation to and from work was provided for him by respondent as an express or implied incident of the employment. This was for the jury.

Bailey v. *Central Vermont Ry.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444.

Tiller v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610.

Tennant v. *Peoria & Pekin Union Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520.

Lavender v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916.

Wilkerson v. *McCarthy*, 336 U. S. 53, 68 S. Ct. 413, 93 L. Ed. 479.

Assuming, as the Court of Appeals said, that the evidence on the uncontroverted issue was undisputed, still it was such as to warrant the inference drawn by the jury therefrom.

Tiller v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 451, 87 L. Ed. 610.

Cardillo v. *Liberty Mut. Ins. Co.*, 330 U. S. 469, 478, 67 S. Ct. 801, 807, 91 L. Ed. 1028.

The jury's conclusion from such evidence that decedent was within the course of his employment when killed was reasonable and hence was supported by the evidence and should not have been set aside.

Tennant v. *Peoria & Pekin Union Ry. Co.*, 321 U. S. 29, 35, 64 S. Ct. 409, 88 L. Ed. 520.

d D.C. worked Quantico

II.

The Holding of the District Court That, as a Matter of Law, the Employment Relation Did Not Exist at the Time of His Fatal Injury Because:

A. by traveling from Vernon to Tipton by Private Automobile He Departed the Course of His Employment, and

B. by Traveling From Tipton to His Home at Sharpsville on Respondent's Right of Way by Transportation Provided by Respondent as an Incident of Decedent's Employment, He Did Not Return to the Course of His Employment

is in Conflict With Applicable Decisions of This Court and Other Courts of Appeal.

A.

The course of employment of a railroad employee may extend beyond the premises of his employer.

Thus, an employee, pursuing a way of ingress or egress from the employer's premises, but adjacent thereto, used by employees with the consent of the employer, express or implied, is in the course of his employment.

> *Bountiful Brick Co.* v. *Giles,* 276 U. S. 154, 48 S. Ct. 221, 72 L. Ed. 507.
>
> *Cudahy Packing Co. of Nebraska* v. *Parramore,* 263 U. S. 418, 44 S. Ct. 153, 68 L. Ed. 366.

And, where, by an express or implied agreement, the employer is obligated to transport the employee to and from work as an incident of the employment, an injury

or death sustained during such travel, though off the employer's premises, is within the course of employment.

Kellog v. *Hicks,* 285 U. S. 502, S. Ct. 450, (Gasoline launch carrying employees across Hudson River; transportation time not compensated).

Cardillo v. *Liberty Mut. Ins. Co.,* 330 U. S. 469, 480, 67 S. Ct. 801, 808, 91 L. Ed. 1028, (Death on public highway; employer bound by express contract to transport at its cost).

In the *Cardillo* case, this court said:

"Each employment relationship must be perused to discover whether the employer, by express agreement or by a course of dealing, contracted to and did furnish this type of transportation." (480.)

"In other words, where the employer has promised to provide transportation to and from work, the compensability of the injury is in no way dependent upon the method of travel which is employed." (483.)

That the automobile actually used in such travel was not that of respondent but that of a fellow employee is, of course, immaterial for, had his death occurred during the Vernon-Tipton trip, it would have arisen out of and in the course of his employment.

Cardillo v. *Liberty Mut. Ins. Co.,* 330 U. S. 469, 480, 67 S. Ct. 801, 808, 91 L. Ed. 1028.

Heaps v. *Cobb,* 45 A. (2d) 73, 78.

W. C. Sharp Drug Stores v. *Hansard,* 144 S. W. (2d) 777.

That he could have walked three (3) miles through the rain to Muncie and stayed there over night at respondent's expense is not material since the jury, upon the evidence, could reasonably find that the option or choice was his as an incident, express or implied, of the employment.

It is clear, therefore, that at no time prior to the fatal collision had the employment relation terminated within the Federal Employers' Liability Act.

B.

Where a departure or digression has been such as to take it out of the course of the employment, a return to the work itself or to an activity reasonably incident thereto brings the employee again within the course of his employment.

Rogers v. *Davis,* 228 P. 330.
Maryland Cas. Co. v. *Levine,* 67 F. (2d) 816.
C. F. Lytle Co. v. *Whipple,* 156 F. (2) 155.

In *Rogers* v. *Davis,* 228 P. 330, the court in part stated:

> "We conclude that the mere fact he left the engine for a few moments for purposes of his own did not absolve appellant from the exercise of reasonable care toward him when he returned." (332.)

In *Maryland Cas. Co.* v. *Levine,* 67 F. (2d) 816, the Court of Appeals for the Fifth Circuit held an employee to be within the course of his employment although such employee, while traveling from one place of work to another, deviated from a direct course to conduct private business. At the time of the injury, the employee had resumed his travel toward his next place of work. It was contended that the employee, having departed from the course of his employment, did not return to it until he had reached the place where he was to resume work for the employer. In rejecting this contention, the court in part said:

> "This will not do. The jury found, upon ample supporting evidence, that Levine was, when killed, on the direct route to the place to which he had been sent

on company business. Thus it stands established that, the deviation at an end, he had resumed his route of duty, and that the only reason for his being where he was when he was killed was the business of the company which, under direct injunctions from his employer, he was on his way to perform.

"Universally applied as is the rule that coverage ceases during deviations from the course and scope of the employment, and injuries suffered during such deviation are not compensable (cases cited), it is with equal universality held that, the deviation over, all injuries thereafter received are compensable, (cases cited)." (818.)

And, in *C. F. Lytle Co.* v. *Whipple,* 156 F. (2d) 155, the Court of Appeals for the Ninth Circuit similarly held that the question, whether an employee was within the course of his employment while riding from his place of work to his barracks in his employer's truck although he had gotten intoxicated early in the evening, was a question of fact, and that the finding that his death arose out of and in the course of his employment was supported by evidence.

Here the decedent met his death while going home from work, as an incident of his employment. At such time he was using respondent's motor hand car on its right of way. This too was an incident of such employment.

Regardless, therefore, of the nature of the private transportation between Vernon and Tipton, at the time he was killed by respondent's negligence, decedent was in the course of his employment in interstate commerce and this court ought so to hold.

Conclusion.

The issue of whether the employment relation existed at the time of death depends on whether the respondent, expressly or by course of dealing, obligated itself to provide him transportation to and from work. Such is a question of fact and, upon the evidence and inferences reasonably to be drawn therefrom, was for the jury. The jury, by its general verdict found all fact issues submitted to it in petitioner's favor. The District Court not only erred in setting aside this verdict upon the ground the evidence presented only one reasonable inference, but, also erred in holding, as a matter of law, that decedent's trip in the private automobile was a termination of the employment relation. Such holding ignored the evidence pertaining to the assignment of the motor car and its use by decedent and the nature of his employment and hours of duty. The Court of Appeals erred in affirming the District Court's holding that the issue was one of law for the court, and, that, as a matter of law, decedent's employment relation had terminated before the accident. Assuming, but not conceding, the Court of Appeals and the District Court were right in treating the automobile trip a departure from the course of employment, nevertheless, in resuming travel home on the basis provided by respondent and utilized for fourteen years by decedent with the knowledge of the railroad decedent had returned to the course of employment just as though he were actually back at work.

One by one, judicial limitations upon the remedy provided railroad employees by the Federal Employers' Liability Act have been removed by Congress and this Honor-

able Court. By taking the question of the existence of the employment relation away from the jury and deciding it as a question of law, the courts can very effectively limit and control the application of the act. This court ought not to permit that fact issue to be withheld from the jury in this case any more than it has the issues of negligence and proximate cause in other cases arising under the Act.

There is a vital need for a determination by this court that the remedy of the Federal Employers' Liability Act is available to railroad employees, otherwise entitled thereto, while they are traveling to and from work upon the employer's premises and/or by transportation provided by the employer as an incident of the employment. In other words, this court ought to expressly apply the decision of the *Cardillo* case to railroad employees for purposes of the Federal Employers' Liability Act.

Equally vital is the necessity for a clarification by this court of the effect of any temporary deviation or departure from the business of the employer prior to the utilization by any such employee of such transportation. In other words, this court ought to expressly adopt the decisions of the *Maryland Casualty Company* (67 F. (2d) 816) and *C. F. Lytle Co.* (156 F. (2d) 155) cases as determining the principle of law applicable to railroad employees otherwise entitled to the benefit of the Federal Employers' Liability Act. However, such a determination is not essential to a decision of this case, if the court determines, as petitioner contends, that decedent never was without the scope of his employment prior to his death.

For a determination of these substantial Federal questions and to resolve the apparent conflict between the holding of the Court of Appeals and the applicable deci-

sions of this court and other Courts of Appeal, the writ of certiorari should issue to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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